

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 160

Docket No. SF-0752-07-0550-C-1

**Douglas C. Felch,
Appellant,
v.
Department of the Navy,
Agency.**

August 24, 2009

Douglas C. Felch, California City, California, pro se.

Francesca Maureen Ramos, San Diego, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of a compliance initial decision that denied his petition for enforcement. For the reasons set forth below, we GRANT the petition for review under [5 C.F.R. § 1201.115](#), VACATE the compliance initial decision, and REMAND the case for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant filed a Board appeal of his indefinite suspension. Initial Appeal File (IAF), Tab 1 at 4. While the appeal was pending, the parties entered

into a settlement agreement. IAF, Tab 21. The relevant portions of the settlement agreement provide:

[The agency will] cancel and purge from [the appellant's] Official Personnel Folder (OPF) the Notification of Personnel Action (SF-50) form that placed him on indefinite suspension. . . . In addition, the Notice of Proposed Removal dated 23 August 2007 will be rescinded.

. . . .

The Agency will designate Marlene Kumro, Human Resources Specialist . . . as the agency Human Resources point of contact to whom [the appellant] may direct prospective employers for information pertaining to his employment with [the agency]. . . . The agency's point of contact may release to prospective employers the following information:

- i. Dates of employment with [the agency]
- ii. Job title and grade levels
- iii. Salary
- iv. His performance evaluations were all satisfactory

. . . .

. . . [The appellant agrees to r]esign or retire. . . .

. . . .

The parties agree that they will not disclose or discuss the terms of this settlement with other agency employees except those who may have a need to know in the course of their official duties or as otherwise required by law or regulation.

. . . .

The Agreement will be made part of the Merit Systems Protection Board record for enforcement purposes by that agency.

. . . .

. . . The parties further agree that they shall not cause this settlement, its terms, and underlying facts surrounding the instant appeal to be publicized in any newspaper, magazine, book, motion picture, television or radio program, or on the Internet.

Id. at 2-4, 7-8.

¶3 The administrative judge accepted the agreement into the record for enforcement purposes and issued an initial decision dismissing the appeal as settled. IAF, Tab 22 at 1-2. The appellant filed a petition for review, which the Board denied by final order. I-1 Petition for Review File, Tabs 1, 7.

¶4 The appellant subsequently filed a petition for enforcement, alleging that the agency breached the settlement agreement by: (1) Failing to purge his OPF of references to the suspension, Compliance File (CF), Tab 9 at 7; and (2) providing the California Unemployment Insurance Appeals Board (UIB) with information about his suspension, CF, Tab 2 at 3, Tab 9 at 5-7. As evidence of the alleged breach, the appellant submitted a Notice of Determination from the UIB, addressed to the agency, which stated, “You provided information regarding the eligibility of the [appellant]. . . . You suspended [the appellant]. After considering the available information, the Department finds the reason for suspension does not meet the definition of misconduct connected with the work.” CF, Tab 9 at 8. The appellant requested that the Board impose sanctions against the agency. *Id.* at 7.

¶5 The agency responded, arguing that, because the UIB is not a prospective employer, the settlement agreement does not restrict the information that the agency may provide to the UIB. CF, Tab 5 at 7, Tab 10 at 7. The agency further argued that, even if the UIB were a prospective employer, the appellant was to blame for the release of the suspension information because he failed to direct the UIB to the point of contact designated in the settlement agreement. The agency stated that “the information was provided by [Defense Civilian Personnel Management Service]/AC in Arlington, Virginia and not the agreed upon point of contact.” CF, Tab 5 at 7; IAF, Tab 21 at 3. The agency subsequently tempered this statement, asserting that the appellant provided no evidence as to who provided the information to the UIB, and suggesting that the UIB might have obtained the information prior to the settlement agreement in response to the appellant’s request for unemployment benefits during the time he was actually

suspended. CF, Tab 10 at 6-7 & n.3. The agency also asserted that it had revised the appellant's OPF in accordance with the terms of the settlement agreement. CF, Tab 10 at 7-8; IAF, Tab 21 at 2. In support of its assertion, the agency submitted an SF-50 documenting the appellant's voluntary retirement for the purposes of obtaining retirement benefits. CF, Tab 10 at 12.

¶6 The administrative judge issued a compliance initial decision denying the petition for enforcement. CF, Tab 12 (CID) at 1-2. The administrative judge found that "the UIB was not a prospective employer, and there were no terms whatsoever [in the settlement agreement] addressing the agency's obligations regarding its participation or input in the appellant's efforts to obtain unemployment benefits." CID at 2.

¶7 The appellant filed a petition for review, making various arguments that the agency breached the settlement agreement by disclosing information about his suspension to the UIB. C-1 Petition for Review File (PFRF), Tab 1 at 4-6. He cites *Pagan v. Department of Veterans Affairs*, [170 F.3d 1368](#), 1370 (Fed. Cir. 1999), for the proposition that the agency had promised to grant him a "clean record." *Id.* at 6. The appellant also argues that the administrative judge "[may be] predisposed to ending any further claims," citing in support of his contention a compact disc that he has submitted for the first time on review. PFRF, Tab 1 at 5, Tab 3. The agency has filed a response addressing the appellant's arguments, PFRF, Tab 5 at 6-8, and arguing that the petition for review should be denied for failure to meet the review criteria, *id.* at 6, 8-10.

ANALYSIS

¶8 The Board interprets settlement agreements by applying the law of contracts. *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988); *Torres v. Department of Homeland Security*, [110 M.S.P.R. 482](#), ¶ 9 (2009). In construing the terms of a written settlement agreement, the words of the agreement itself are of paramount importance. *Saunders v. U.S. Postal Service*,

[75 M.S.P.R. 225](#), 229 (1997). In construing a settlement agreement, the Board examines the four corners of the agreement to determine the parties' intent. *Wells v. Department of the Treasury*, [89 M.S.P.R. 228](#), ¶ 7 (2001).

¶9 Construing the terms of the settlement agreement in accordance with precedent of the Board and the U.S. Court of Appeals for the Federal Circuit, we find that the administrative judge erred in finding that the settlement agreement did not restrict what information the agency could disclose to the UIB. CID at 2. The Board and the Federal Circuit have construed settlement agreements that provide for expungement of adverse action-related documents from an OPF as requiring agency communications with third parties to reflect what the OPF, as amended, shows. *E.g.*, *Conant v. Office of Personnel Management*, [255 F.3d 1371](#), 1376 (Fed. Cir. 2001); *Principe v. U.S. Postal Service*, [100 M.S.P.R. 66](#), ¶¶ 6, 9 (2005). In addition, even where a settlement agreement only provides for expungement of adverse action-related documents from an appellant's OPF, the Federal Circuit has construed such a provision to provide for expungement of those documents from all "personnel records that are officially kept." *E.g.*, *King v. Department of the Navy*, [130 F.3d 1031](#), 1033-34 (Fed. Cir. 1997). The key concern in such cases is that the Board "see to it that the parties receive that for which they bargained." *Principe*, [100 M.S.P.R. 66](#), ¶ 8 (quoting *Pagan*, 170 F.3d at 1372).

¶10 The settlement agreement at issue here provides that the agency will "cancel and purge" from the appellant's OPF the SF-50 documenting his indefinite suspension, and that the notice of proposed removal would be rescinded. IAF, Tab 21 at 2. We find that this provision is materially similar to those at issue in *Conant* and *Principe*, which effectively required the agencies in those cases to expunge adverse action-related documents from the appellants' entire professional records and not to disclose adverse action-related information to third parties, even though the agreements did not explicitly set forth those requirements. The settlement agreement in *Conant* provided that the agency

would rescind the SF-50 documenting the appellant's removal and issue a new SF-50 indicating that the appellant "resigned for personal reasons." *Conant*, 255 F.3d at 1373. The court construed this provision as, "in effect," a promise by the agency to erase "'removal' and all reasons for such removal from [the appellant's] professional record with the agency," leaving the SF-50 stating that the appellant resigned for personal reasons as the only legal document recording the end of her employment with the agency. *Id.* at 1376.

¶11 The settlement agreement in *Principe* provided that the agency would rescind the appellant's removal and issue a PS-50 indicating that she had resigned. *Principe*, [100 M.S.P.R. 66](#), ¶ 2. The Board construed this provision as a promise by the agency to destroy all removal-related documents, erase "removal" and all reasons for such removal from the appellant's professional record with the agency, and leave the PS-50 indicating her resignation as the only remaining document recording the end of her employment with the agency. *Id.*, ¶ 9. The Board explained its construction of the settlement agreement based on its understanding of *Conant*:

The settlement terms here are materially similar to those in *Conant*, in requiring the agency to "rescind" the removal and to "issue" a new PS-50 reflecting the appellant's resignation, without explicitly requiring the agency to clean, expunge, purge, or delete removal-related documents from her personnel file or explicitly precluding disclosure of such documents to third parties.

Id.

¶12 The settlement agreement at issue here is also similar to the agreements in *Conant* and *Principe* inasmuch as it contains additional terms providing further support for our conclusion that it prohibits the agency from disclosing adverse action-related information to third parties. In *Conant*, the Federal Circuit considered language in the settlement agreement that the agency would use its "best efforts" to "effectuate" the appellant's disability retirement as further support for its conclusion that the agreement precluded the agency from

disclosing removal-related information to the Office of Personnel Management. *Conant*, 255 F.3d at 1376. In *Principe*, the Board considered language in the settlement agreement that the parties were to keep the terms and conditions of the agreement “confidential” as lending further support for its finding that the agency was precluded from disclosing removal-related information to the Social Security Administration. *Principe*, [100 M.S.P.R. 66](#), ¶¶ 2, 10. Likewise, we find that the additional settlement terms here, i.e. that the parties would not publish the terms or surrounding circumstances of the agreement or discuss its terms with other agency employees, IAF, Tab 21 at 7-8, lend further support to our construction of this agreement as prohibiting the agency from disclosing adverse action-related information to the UIB.

¶13 A major benefit that the appellant obtained in exchange for his voluntary retirement and withdrawal of his appeal was the elimination of adverse action-related documents from his professional record so that third parties may not come to know of them or their attendant circumstances. *See Thomas v. Department of Housing & Urban Development*, [124 F.3d 1439](#), 1442 (Fed. Cir. 1997). If his employment records continue to contain information relating to the suspension or notice of proposed removal, the appellant will not have received the benefit of his bargain. *See King*, 130 F.3d at 1034 (it was “highly unlikely that the parties bargained for the purging of only local personnel files, while [files in other locations] retain[ed] the undesired information”). Therefore, in order to be in compliance with the settlement agreement, the agency must eliminate all references to the suspension and notice of proposed removal from the appellant’s professional record with the agency. *See Conant*, 255 F.3d at 1376; *Principe*, [100 M.S.P.R. 66](#), ¶ 9.

¶14 The settlement agreement also prohibits the agency from disclosing any information about these matters to third parties, including the UIB. Although the settlement agreement does not explicitly address the agency’s obligations with regard to its communication with third parties, the agency’s obligations under the

expungement provision cannot be fulfilled if it discloses to any third party – prospective employer or otherwise – any information about the appellant’s rescinded suspension or notice of proposed removal. *See Pagan*, 170 F.3d at 1371-72 (although the settlement agreement did not address the type of references the agency was required to provide, the agency was required to provide references as if the appellant had the clean record that it had agreed to provide); *Principe*, [100 M.S.P.R. 66](#), ¶ 9 (the agreement implicitly prohibited the agency from disclosing removal-related documents to third parties); *see also Torres*, [110 M.S.P.R. 482](#), ¶ 12 (the settlement agreement, which required the expungement of all removal-related documents from the appellant’s OPF, implicitly required that the agency refrain from disclosing to third parties any information about the appellant’s removal; if the agency were to expunge the documents from the appellant’s record but still communicate with third parties about the removal, the appellant would not receive the benefit of his bargain).

¶15 The UIB has undoubtedly become aware of the appellant’s suspension, as evidenced by the notice that it sent to the agency addressing the matter. CF, Tab 9 at 8. If the agency informed the UIB of the appellant’s suspension while the settlement agreement was in effect, then the agency materially breached the settlement agreement, unless it was required by law or regulation to disclose that information to the UIB. *See Conant*, 255 F.3d at 1377 (the agency’s disclosure to the Office of Personnel Management of removal-related information constituted a material breach); *Torres*, [110 M.S.P.R. 482](#), ¶ 12 (the agency’s disclosure to a background investigator of removal-related information would constitute a material breach); *Principe*, [100 M.S.P.R. 66](#), ¶ 10 (the agency’s disclosure to the Social Security Administration or other third parties of removal-related documents would constitute a material breach). However, because he did not find it necessary to reach the issue, the administrative judge made no findings with regard to when or from what source the UIB became aware of the appellant’s

suspension, CID at 2, and we are unable to make any such determination on the existing record.

¶16 We must therefore remand the appeal for further adjudication. On remand, the administrative judge^{*} shall adjudicate the merits of the petition for enforcement, making findings as to whether: (1) The agency has purged all references to the suspension and notice of proposed removal from the appellant's professional record; and (2) whether the agency disclosed any information regarding these matters to the UIB or any other third party after the September 13, 2007 effective date of the settlement agreement. If the administrative judge determines that the agency disclosed information about these matters to the UIB or any other third party after the effective date of the settlement agreement, the administrative judge shall make findings as to whether the agency was required by law or regulation to disclose that information. The administrative judge shall direct the parties to submit evidence and argument on the issue, and he shall conduct a hearing if there is a genuine issue of fact material to the agency's alleged breach of the settlement agreement. *See Torres*, [110 M.S.P.R. 482](#), ¶ 13.

* We have considered the appellant's suggestion that the administrative judge is biased against him, and we have reviewed the compact disc that he has submitted in support of his contention. PFRF, Tab 1 at 5, Tab 3. The appellant's argument is insufficient because he has raised it for the first time on review. *See Womack v. U.S. Postal Service*, [48 M.S.P.R. 348](#), 352-53 (1991) (an appellant is obligated to preserve his objection to the administrative judge's alleged conduct below; he cannot wait until after the adjudication is complete to object for the first time). Moreover, the substance of the appellant's argument is without merit because the only file on the compact disc implicating the administrative judge is a recording of a telephonic conference, and the administrative judge's conduct of the conference was not suggestive of bias. *See Bieber v. Department of the Army*, [287 F.3d 1358](#), 1362-63 (Fed. Cir. 2002) (an administrative judge's conduct during the course of a Board proceeding warrants a new adjudication only if the administrative judge's comments or actions evidence "a deep-seated favoritism or antagonism that would make fair judgment impossible") (quoting *Liteky v. United States*, [510 U.S. 540](#), 555 (1994)). In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Galloway v. Department of Agriculture*, [110 M.S.P.R. 311](#), ¶ 13 (2008). The appellant's claim does not meet this standard.

ORDER

¶17 Accordingly, we remand this case to the Western Regional Office for further proceedings consistent with this Opinion and Order.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.